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No.

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

ROBERT D. STRATMORE,
Petitioner,

VS.

MICHAEL H. GOODBODY,
SHAREEF DANCER (U.S.A.) SYNDICATE,
DALHAM HALL STUD and ROBERT ACTON,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

(1) Whether the Court denied plaintiff his constitutional right to a jury trial on the issue of whether an horizontal agreement by various owners who paid $40,000,000 for a champion stallion to exclude the sale of breeding rights at legitimate auction houses constituted price fixing in the light of significant probative admissions that the intent, purpose and foreseeable result of the exclusion was to stabilize prices in such breeding rights?

(2) Whether the sale of breeding rights for champion stallions enjoys some undefined, implied exemption from the Sherman Act permitting practices precluding competitive bidding condemned by this Court in *National Society of Professional Engineers v. United States*, 435 U.S. 79; 98 S.Ct. 1355; 55 L.Ed. 2d 637 (1978)?

(3) Whether petitioner established injury resulting from the exclusionary activities of the respondent for purposes of the Sherman Act?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, Robert D. Stratmore, respectfully requests that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on January 23, 1989.

OPINIONS BELOW

The Opinion of the District Court granting respondents' motion for summary judgment and the opinion of the Court of Appeals affirming that decision appear in the Appendix to this Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on January 23, 1989. This Petition for Certiorari is filed within 90 days of

that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). Jurisdiction of the District Court was based upon Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26.

STATUTE AND RULE INVOLVED

Section 1 of the Sherman Act (15 U.S.C. § 1) and Rule 56 of the Federal Rules of Civil Procedure appear in the Appendix to this Petition.

STATEMENT OF THE CASE

The thoroughbred horse business—the commercial side of the "sport of kings"—represents a substantial monetary component among all the various sporting businesses in the United States. For example, in this case, $40,000,000 was paid by a number of celebrity owners as part of the syndication of "Shareef Dancer", winner of the 1983 Irish Derby. It is thus significant that, from the day this lawsuit was filed until the present, respected industry observers have readily acknowledged the threat to the industry's economic vitality represented by the type of exclusionary activity which is challenged in this case—the prevention of the owner of a thoroughbred share or season[1] from selling such an asset (breeding rights) in a public market comprised of thoroughbred auctions and exchanges. As an example, one respected publication, shortly after the filing of this lawsuit, analyzed the significance of the litigation as follows:

> Our belief is that . . . the [thoroughbred] industry will be well served by elimination of restraints on the trading and/or pricing of stallion shares and seasons.

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[1] Prominent thoroughbred stallions are frequently syndicated following their racing careers. Purchasers acquire a "share" in the horse at the time of syndication. A share is a fractional, undivided interest in the horse which allows the shareholder the right to breed a mare to the stallion annually during the animal's breeding life. Such an annual right is commonly known as a "nomination" or "season". These shares and seasons are frequently sold by the initial owners.

> The philosophical question which overhangs this case is whether or not the industry can afford to continue its adherence to such business practices, regardless of their legality.
>
> The horse industry, like any other, needs new capital and new investors, particularly now that the prices of breeding and racing stock have escalated so dramatically over the past decade. The cost of entry into this business is not cheap, and the need to spread risk is ever present and growing.
>
> It behooves us to make entry and exit to and from the various commercial market components of our industry as simple as possible. Syndicates are already shielded by the shareholder's needs to protect their investments and their desire to participate in future deals. Restrictive agreements will not protect a bad stallion any more than they can put a lid on a good one. They are, however, potentially restrictive to the growth of the industry.
>
> Are we prepared for a free market system in this business? Perhaps the courts are about to tell us.

Timothy Capps, "Antitrust Actions in the Horse Business", *The Thoroughbred Record*, December, 1986, p. 5963.

Such intense scrutiny has continued to the present day. Following the District Court's dismissal of petitioner's complaint, two items discussing the case in a prominent thoroughbred weekly newspaper, *Thoroughbred Times*, underscored its importance:

> Lexington attorney Don Sturgill, who specializes in stallion syndications, said [the decision by the District Court] "is probably the most important decision handed down to date on stallion syndications. It is very major."

Ron Mitchell, " 'No-Auction' Clause Upheld"; *The Thoroughbred Times*, January 8, 1988, p. 1.

> The outcome of the case could have a major impact on the rights of shareholders to sell nominations at an auction. Syndicate managers have indicated they will wait until appeals are exhausted and a final decision is made on the issue before including no-auction clauses in syndicate agreements.

"Appeal Set in Shareef Dancer Case", *The Thoroughbred Times*, January 22, 1988, p. 3.

To explain this intense interest, a brief examination of the markets for thoroughbred shares and seasons will be useful. Prior to November, 1983, a purchaser of a thoroughbred horse interest could negotiate a sale privately either through a syndicate manager or bloodstock agent or directly with the owner of the share or season. In those days, the only sales vehicle remotely approaching a public market was either a newspaper or magazine advertisement.

However, in November, 1983, a "public market" for thoroughbred horse interests made its debut when a seasons auction was held in Lexington, Kentucky sponsored by Matchmaker Breeders Exchange, Ltd. ("Matchmaker").[2] Following the initial success of the auction, which was attended by over 1,000 persons, auctions which were expanded to include sales of shares were added for January and July of succeeding years and an NYSE-style exchange was established which "conducted weekly trading of stallion shares and seasons."

In February of 1985, petitioner Robert D. Stratmore ("Stratmore"), a California thoroughbred investor, purchased a 1986 breeding season for the thoroughbred stallion Shareef Dancer. In April of 1985, Stratmore listed, and Matchmaker accepted, this season for sale at Matchmaker's November 10, 1985 auction.[3] Then Stratmore became entangled in the anticompetitive conduct which gives rise to this lawsuit. The Shareef Dancer Syndicate

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[2] The auction was scheduled as it was because, at that time in Lexington, "the broadest number and most important breeding stock sales" occur and, thus, nominations could be marketed to the most broadly based and elite group of thoroughbred investors and breeders gathered together in one location each year.

[3] Defendant Robert Acton, in conjunction with sales documents related to Stratmore's acquiring the season, agreed to "quitclaim, release and waive unto [petitioner] . . . any interest it [the Syndicate] may have in the . . . seasons." Thus, all of respondents' exclusionary activities described herein occurred after they had completely released any interest which the syndicate had in petitioner's season.

Agreement contains a clause which reads "At no time shall any share or nomination be sold at auction", a restraint upon the season's alienability of which Stratmore had no notice at the time of his purchase.

On October 28, 1985, defendant Michael H. Goodbody ("Goodbody"), Chairman of the Shareef Dancer Syndicate Committee[4] transmitted to Stratmore a telex requesting that he "withdraw the . . . season from the sale forthwith." A copy of that telex was also delivered to a fellow Englishman, well known to Goodbody, Mr. Harry Herbert, then a Kentucky employee of Matchmaker, with a postscript stating "I am sure that we will have the full cooperation of Matchmaker in the event of Mr. Stratmore deciding to go ahead and offer this season for sale."[5] When, on October 30, 1985, Stratmore, in a telex, a copy of which was sent to Matchmaker, forthrightly refused to "acquiesce

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[4] The investors in a thoroughbred syndication such as this one own 40 shares in the syndicate. Under the terms of this Syndicate Agreement, some aspects of the "affairs and management" of the syndicate are conducted by a syndicate committee, of which defendant Goodbody was, at the relevant time, Chairman, and defendant Dalham Hall Stud ("Dalham Hall") syndicate secretary.

[5] The reason Goodbody could speak with such blithe confidence lies in the structure of share ownership in the Shareef Dancer syndicate. Sheikh Maktoum Al Maktoum of Dubai owns ten shares in the stallion. The influence of the Sheikh and his brother, Sheikh Hamdan Al Maktoum, who purchased a share in the stallion Danzig for over $1 million just prior to the November, 1985 Matchmaker auction, is enormous. As David Heckerman, a respected thoroughbred journalist, testified:

> They [the Maktoums] obviously came with a lot of money and they were willing to go beyond boundaries where anyone else had gone. . .
>
> * * *
>
> [O]n one level support means that we . . . [The Maktoums] have been the biggest spenders of the industry and . . . had been responsible for a lot of people—a lot of Kentucky breeders not only Kentucky, but American breeders—making a lot of money from the sale of yearlings.

in [the defendants] unlawful demand", Goodbody responded, again by way of telex, by stating "I have referred Matchmaker to the terms of the agreement and they have responded accordingly. The Shareef Dancer season has been withdrawn from sale." Barry Weisbord, President of Matchmaker, decided to withdraw the season in order to prevent litigation and Stratmore, who had originally purchased a season for $102,000, ultimately sold it privately for $90,000.

On November 8, 1985, Stratmore filed this action against defendants Goodbody, Dalham Hall, the Shareef Dancer (U.S.A.) Syndicate, and Robert Acton, the General Manager of Darley Stud Management ("Darley Stud"), which is the current syndicate secretary. Stratmore's complaint maintained, *inter alia*, that the no auction clause violated Section 1 of the Sherman Act, inasmuch as it stabilized the prices of thoroughbred shares and seasons by preventing the sale of such interests in the most price sensitive market available to them, the auction forum. In order to support this contention, the petitioner proffered to both the District Court and the Sixth Circuit Court of Appeals six items of direct, unrebutted, admissible, relevant testimony which made out a *prima facie* showing that such a prohibition did have the effect of price stabilization. *To this date, neither court which has rendered a decision in this action has even acknowledged, much less analyzed, these six evidentiary items.* We turn to that evidence now.

First, Barry Weisbord, President of Matchmaker, testified that, as Matchmaker's presence became increasingly accepted in the thoroughbred industry, "Syndicate managers [were] not happy that the [Matchmaker] members would notify you of the product being traded." More specifically, he stated:

> In the years before information was exchanged, they [the syndicate managers] would have more control over the commerce of the industry. Once the information was "public", then it would have given them less control . . . less control to do anything.

* * *

> He [the syndicate manager] was able to create his own demand. He was able to set price, which means it was much easier for him to control the product.
>
> . . . once the price was determined, let's say at auction, theoretically auction means that all the possible or probable buyers had been given notice of the product being offered.
>
> Therefore, the price that is being established would be the price that it is worth to the marketplace. Therefore, it would be true value. In the case of pre-Matchmaker, the value is whatever the syndicate manager decided he wanted to sell the product at . . .

Second, Mr. Timothy Capps, who was, during the relevant time, the Editor and Publisher of *The Thoroughbred Record*, a publication which is among the most respected and oldest trade journals in the thoroughbred business, identified the relationship of auction markets to prices as follows:

> . . . the auction process or the public market process, the listings, services, whatever, establish a price and . . . — whatever the price is is a good price or a bad price, it's a price, and without that venue, without the auction process, without the listing services, the public listing service then the price of a stallion season or share is a little more open than speculation because there is no public listing, there is not theoretical public knowledge.

Third, and most remarkably, Mr. Robert Clay, a member of the Shareef Dancer Syndicate Committee, leading syndicator of stallions, major farm owner, and Shareef Dancer Syndicate shareholder, simply announced that he objected to the auction market because such a setting was "*not good for the stability of the pricing of my stallions.*"

Fourth, there is the testimony of the late Leone Peters, who was eminently qualified to testify upon both marketing in general ("Fortune Magazine once described Peters as the 'wizard of Real Estate', and wrote 'he makes money even in bad times.' " Amy Owens, "A Star from Stone", *The Bloodhorse Magazine*, May 28, 1988, p. 3068) and the economics of thoroughbred marketing, in

particular, given his diverse background. Mr. Peters was successively President (1960-70), Chairman of the Board (1970-76), and Honorary Chairman (1976-88) of Cushman & Wakefield, one of the nation's leading commercial real property management companies. He owned well over 250 horses individually, syndicated thoroughbreds of his own commencing in the early 1970's, was part owner and co-breeder of Gato del Sol, the winner of the 1982 Kentucky Derby, and Risen Star, the winner of the 1988 Preakness and Belmont Stakes; and has purchased and sold numerous shares and seasons in syndicated thoroughbred stallions.

Mr. Peters testified that no auction clauses were not beneficial to his interest as a thoroughbred shareholder and were "in restraint of trade" because they prevented "a shareholder who has made a very substantial investment to sell what he might be stuck with." Even more significantly, he further testified that "it would be harmful if you are not permitted to sell at the auction. I think the auction is a much better place to sell." The reason for this, in Mr. Peters' view, was that "people tend to lose their marble a little bit at auctions", which the District Court somehow took to mean the creation of "artificially enhanced prices." (Appendix, p. A-22)

Fifth, Kerry Fitzpatrick, President and Chief Executive Officer of International Thoroughbred Breeders, Inc. testified:

> Some syndicate managers are a part of the problem rather than the solution. They price their seasons too high in the first place. Then, they complain when someone goes to Matchmaker.

Sixth, Mr. David Heckerman, a long-time journalist specializing in thoroughbred economic issues (and currently the Editor of *The Thoroughbred Record*), who authored an article extensively discussing the "public market" for thoroughbred shares and seasons (David L. Heckerman, "A Niche in the Marketplace", *The Thoroughbred Record*, Nov., 1986, p. 4630, et seq.), testified in this lawsuit as follows:

> It's . . . so clear that the morning after a trade is reported on Matchmaker at a certain price, syndicate managers get

> calls from people saying various things that they have to attend to and wish they didn't. Joe Hickey's—the quote in there . . . this is the kind of thing I have heard in numerous places. I quote Joe Hickey as saying, "I got my season for $10,000. I just saw one go on Matchmaker for $4,000. Why didn't I get mine for that?" That's what happens all the time I'm convinced.

With respect to the injury that he suffered as a result of the enforcement of the no auction clause, Stratmore proffered three specific evidentiary items involving either comparable sales or expert valuation. This testimony established that, had he been allowed to sell his 1986 Shareef Dancer season at the November, 1985 Matchmaker auction, Stratmore was substantially certain to have obtained more than the $90,000 which he ultimately received for it.

First, a mere 10 days after the November, 1985 Matchmaker auction, Darley Stud bought a 1986 Shareef Dancer nomination for $150,000, no guarantee.[6] Second, on March 26, 1985, Darley Stud paid the same amount, $150,000, no guarantee to W.T. Young, Inc. for a 1986 Shareef Dancer season. Third, petitioner proffered the testimony of George I. E. Harris, a noted Bloodstock sales agent, with whom he listed the 1986 season on July 12, 1985. Mr. Harris opined that, in his judgment, the $160,000, no guarantee price for which the sale was then listed by Stratmore, was "a marketable one."

The significance of this testimony was underscored by testimony that the November Matchmaker auction represented the

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[6] A "no guarantee" sale is distinguished from that which is known as a "live foal" sale. In the former, the price of the season is due and payable in advance of the breeding irrespective of whether a live foal is born from the use of that breeding season. On the other hand, the amount paid for the latter is ordinarily only due upon the birth of a live foal resulting from the use of the season. As might be expected, the latter is typically valued higher. (The no guarantee price is normally ⅔-¾ that of a comparable live foal season, essentially the insurance risk placed on the transaction by Lloyds of London and other insurers.) Stratmore's $90,000 sale was "no guarantee".

"high water mark" of the shares and seasons sales market, in part due to the fact that buyers from all over the world were present for the annual Keeneland sales which occurred around the same time. Moreover, when Stratmore sought a motion for a temporary restraining order in this lawsuit, in November, 1985, respondents' own counsel represented to the Court that the value of the season was "somewhere between $125,000 and $200,000."

The District Court, on December 30, 1987, granted defendants' motion for summary judgment. The Sixth Circuit Court of Appeals affirmed this decision on January 23, 1989. With respect to the conclusion of both Courts that the no auction clause did not violate Section 1 of the Sherman Act, the reasons are set forth in the Opinions which are appendices to this Petition. In each of the Opinions, the six specific items of liability evidence set forth above are completely ignored. Moreover, both Courts concluded, as a matter of law, wrestling with the facts and weighing contending positions like jurors, that the petitioner's injury, since his comparable sales could be characterized as "special circumstances", had been totally unproven.

REASONS FOR GRANTING THE WRIT

Important questions of law are presented which deserve this Court's review. Not only will the remarkable reasoning of the Court below be seized upon to intolerably thwart private antitrust enforcement, but the decision threatens to emasculate well settled law regarding the proper standards for evaluating summary judgment motions under Rule 56 of the Federal Rules of Civil Procedure.

A. Beyond the Antitrust Area

The Decision Represents a Manifestly Erroneous and Unjustifiably Broad Interpretation of the Standards for Granting Summary Judgment Under Rule 56 of the Federal Rules of Civil Procedure.

Notwithstanding the serious efforts which have been devoted by this Court to clarifying its views concerning the proper scope of discretion for a trial court in ruling on summary judgment

motions in the last several years (e.g., *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)), nothing, absolutely nothing, contained in those decisions foreshadows the manner in which the Courts below dealt with the petitioner's claim. For example, in *Anderson v. Liberty Lobby, Inc.*, supra, this Court found summary judgment appropriate in a libel case due to a total failure of proof on the issue of actual malice. (477 U.S. at 246.)

By way of contrast, in this case, there were six admissible probative pieces of direct evidence establishing that the application of a no auction clause had the natural and foreseeable effect of stabilizing prices in thoroughbred shares and seasons subject to such a restraint. Moreover, there were three unrebutted admissible items of evidence establishing that petitioner had suffered injury from an inability to accomplish a sale of his thoroughbred season at a public auction market. Yet, to read the opinions below, one would hardly know that any of the first category even existed and would be led to the conclusion that, as a matter of law, categorizing an item of damage proof as a "special circumstance" must, of necessity, remove it as a triable issue of fact.

In *Anderson*, supra, the Court reiterated that the duty of a party seeking summary judgment is to foreclose "the possibility of the existence of certain facts from which 'it would be open to a jury . . . to infer from the circumstances' " that a *prima facie* case existed. (477 U.S. at 249, quoting *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed. 2d 142 (1970)) First, an examination of the petitioner's damage proof establishes how far removed from such a "foreclosure" was the respondents' evidentiary proof.

It simply cannot, as a matter of law, be said that a sale, even if a "special deal" is not probative with respect to the value of the item which is being sold. The obvious question, which lurks behind any "special deal" is, "Assuming such an arrangement, how was the price for the sale arrived at?" The logical inference is that the amount which was set represented a reasonable value for the item being sold irrespective of the nature of the "deal". This is particularly true here when one bears in mind that

petitioner was precluded from participating in a sale during the "high water mark" of the thoroughbred shares and seasons market. Thus, a strong inference existed that he would have been able to obtain more than the $90,000 which he ultimately received.

Secondly, this case is not one which compels economic rationality type analysis which was employed in *Matsushita,* 475 U.S. at 587, for the simple reason that in this case six specific pieces of evidence were proffered which provided *direct testimony* that the effect which the no auction clause was alleged to have produced—price stabilization—did, in fact, occur. Most dramatically, one of these six items was the direct testimony of a member of the Shareef Dancer Syndicate Committee, who objected to the auction forum because of its negative impact on the "stability of the pricing" of thoroughbreds for which he was syndicate manager. It is as if, in a libel case, a newspaper writer being sued stated that, in writing the news article on which the lawsuit was based, he inserted the challenged material out of malicious feelings toward the plaintiff, and the Court, in evaluating such testimony concluded that this testimony created no triable issue of fact for the jury.

Both Courts who have evaluated petitioner's claim have, at some great length, engaged in substantial *theoretical* analysis of the effect of a no auction clause on the prices of thoroughbred shares and seasons. Yet, with all due respect, it is axiomatic that in determining whether or not triable issues of fact exist for the jury, Federal Rule 56, at a bare minimum, mandates the Court to consider the testimony the party opposing summary judgment proffers as creating such triable issues in order to make a proper determination on the merits of the motion. In failing to do so, the Courts below manifestly, and with no mandate from any decisions of this Court to do so, deprived petitioner of his clear entitlement to a jury trial by means of conscious inattention to relevant evidence.

B. Antitrust Issues

1. Under the Holdings of *National Society of Professional Engineers* and *Indiana Federation of Dentists*, the No Auction Prohibition Constitutes a Clear Cut Violation of the Sherman Act

At a practical, visceral level, there would simply appear to be something reprehensible and incongruous about a restraint which prevented, for example, valuable art work from being sold at prominent auction houses such as Christies and Sothebys. Even if such a prohibition did not have the price stabilizing effect which the evidence in the record in this case indicates is the natural and foreseeable result of a similar restraint in the thoroughbred horse business, such a blatant rejection of consumer preferences, without any justification, manifestly impedes free market forces.

The testimony of Robert Clay, an agent for and representative of defendant Shareef Dancer (U.S.A.) Syndicate, that auction markets were "not good for the stability of . . . pricing of my stallions" was, in and of itself, sufficient to create triable issues of fact on petitioner's price fixing claim. Moreover, in addition to this direct testimony, a brief examination of the type of restraint challenged here against the backdrop of prior decisions of this Court shows precisely how repugnant such a restraint is, particularly when viewed under the looking-glass of "consumer preferences."

It must be borne in mind that the no auction clause is a form of a ban on competitive bidding for thoroughbred shares and seasons. This Court quickly disposed of a similar ban imposed by "ethical rules" on engineers in *National Society of Professional Engineers v. United States*, 435 U.S. 679; 98 S.Ct. 1355; 55 L.Ed. 2d 637 (1978). The Court properly noted, as is similarly true in this case, that "no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement". (435 U.S. at 692; 98 S.Ct. at 1366)

One feature of the ban which this Court found noteworthy was that it:

> "Impedes the ordinary give and take of the marketplace", and substantially deprives the customer of "the ability to utilize and compare prices in selecting engineering services".

435 U.S. at 692-3, 98 S.Ct. at 1366

As we have discussed above, the no auction clause here under examination suffers from the same infirmities. Similarly, in striking down various limitations on the number of live television broadcasts of college football games, this Court, in *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85; 104 S.Ct. 2948 (1984) refused to tolerate such restraints because they had "the effect of reducing the importance of consumer preference" and thus were "not consistent with this fundamental goal of antitrust law." (468 U.S. at 107; 104 S.Ct. at 2963.)

Most recently, the central role of consumer preference was again reaffirmed in *FTC v. Indiana Federation of Dentists*, 476 U.S. 447; 106 S.Ct. 2009 (1986) where Justice White, speaking for a unanimous Court, forthrightly stated, in affirming a finding of illegality with respect to a concerted refusal to forward x-rays to insurance companies along with medical claim forms:

> A refusal to compete with respect to the package of services offered to customers, no less than a refusal to compete with respect to the price term of an agreement, impairs the ability of the market to advance social welfare by insuring the provision of desired goods and services to consumers at a price approximating the marginal costs of providing them. Absent some countervailing procompetitive virtue . . . such an agreement limiting consumer choice by impeding the "ordinary give and take of the market" [citing *Society of Professional Engineers*] cannot be sustained . . .[7]

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[7] There has been literally no showing of such a "countervailing procompetitive virtue" for the no auction clause. The only justification which has been advanced for it is one that is inherently self-contradictory. The respondents maintain, and both Courts which have considered the matter have accepted, the contention that the clause exists to

(footnote continued)

* * *

> A concerted and effective effort to withhold (or make more costly) information desired by consumers for the purpose of determining whether a particular purchase is cost-justified is likely enough to disrupt the proper functioning of the price-setting mechanism of the market that it may be condemned even absent proof that it resulted in higher prices or . . . the purchase of higher-priced services than would occur in its absence. *Society of Professional Engineers*, supra. Moreover, even if the desired information were in fact completely useless to [customers] in making an informed choice regarding the least costly adequate course of treatment . . . the Federation would still not be justified in deciding on behalf of its members' customers that they did not need the information . . . The Federation is not entitled to pre-empt the working of the market by deciding for itself that its customers do not need that which they demand . . .

F.T.C. v. Indiana Federation of Dentists, 476 U.S. at 459-462, 106 S.Ct. at 2018-2020. This is precisely the analysis which should be applied to such relevant consumer information as the prices for which thoroughbred shares and seasons are traded at auction. The same decision quickly disposed of a "quality of care" argument advance by the Indiana dentists, one which is similar to the "quality of mares" argument made here by the respondents, as follows:

> The argument is, in essence, that an unrestrained market in which consumers are given access to the information they believe to be relevant to their choices will lead them to make unwise and even dangerous choices. Such an argument amounts to "nothing less than a frontal assault on the basic policy of the Sherman Act."

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preserve the quality of mares bred to Shareef Dancer, thus resulting in superior offspring. Neither in most private sales nor the weekly exchanges is the identity of the mare even known to the seller or his agent at the time of sale; clearly, the determining factor with respect to quality of mares bred is the amount of the nomination fee paid.

476 U.S. at 463; 106 S.Ct. at 2020 (citing *Society of Professional Engineers,* supra, 435 U.S. at 695, 98 S.Ct. at 1367) Petitioner's legal challenge to the exclusionary activities which are the subject of this lawsuit, thus, follows in a tradition of antitrust analysis which this Court has adopted time and time again. The refusal of the courts below to allow petitioner a trial by a jury of his peers on those claims, therefore, so deviated from that method of analysis as to constitute a flagrant denial of his constitutional right to trial by such a jury guaranteed him by the Seventh Amendment to the United States Constitution.

2. The Proof of Injury Made By Petitioner Easily Satisfied Existing Legal Standards

Petitioner Stratmore has been placed, with respect to his proof of his injury resulting from the exclusionary acts of the defendants, in a position which this Court has always found to be repugnant. As then Justice Rehnquist stated in *J. Truett Payne Co. v. Chrysler Motors Corp.,* 451 U.S. 557, 567-68; 101 S.Ct. 1923, 1929; 68 L.Ed. 2d 442 (1981), "It does not 'come with very good grace' for the wrongdoer to insist upon specific certain proof of the injury which it has itself inflicted." (Citations omitted)

Yet, thus far, that is precisely what the respondents have successfully done in this litigation. We have previously discussed the damage proof proffered by Stratmore. Neither court which has rendered an opinion in this case has even bothered to address the expert testimony rendered by George I.E. Harris. Such testimony constituted a clearly adequate rationale for proof of injury. (See *Copper Liquor, Inc. v. Adolph Coors Co.,* 624 F.2d (5th Cir. 1980); *Franklin Music Co. v. American Broadcasting Companies,* 616 F.2d 528 (3d Cir. 1979); *Alover Distributors, Inc. v. Clover Co.,* 513 F.2d 1137 (7th Cir. 1975); *Lehrman v. Gulf Oil Corp.,* 500 F.2d 659 (5th Cir. 1974), Cert. Denied, 420 U.S. 929 (1975); *Randy Studebaker Sales, Inc. v. Nissan Motor Corp.,* 533 F.2d 510 (10th Cir. 1976); *Mid-Texas Communications System, Inc. v. American Telephone & Telegraph Co.,* 615 F.2d 1372 (5th Cir. 1980), Cert. Denied, 449 U.S. 912 (1980).)

In addition, the two comparable sales which were proffered represented one variation on what is known as the "yard stick"

method of proof which has been approved in *Bigelow v. RKO*, 327 U.S. 251, 66 S.Ct. 574, 90 L.Ed. 652 (1946); *Lehrman v. Gulf Oil Corp.*, supra; *Richfield Oil Corp. v. Karseal Corp.*, 271 F.2d 709 (9th Cir. 1959), Cert. Denied, 361 U.S. 961 (1960) (See also Dunn, *Recovery of Damages for Lost Profits*, 3d § 5.8, pp. 264-5 (Lawpress 1987), citing eighteen decisions authorizing (with only negating) this method of establishing commercial damages.)

Thus, there was clear authority for both methods by which Stratmore attempted to establish his injury. It is of simply no moment to say that the two comparable sales represented "special circumstances". As we have stated above, such circumstances, even if true, do not establish how the price which was chosen was arrived at. These were, thus, undisputed facts from which disputed inferences could have been drawn and the Courts below were clearly wrong in finding to the contrary.

CONCLUSION

The impact of the decision below goes far beyond thoroughbred breeding and racing; it interferes with the administration of justice under Rule 56 of the Federal Rules of Civil Procedure. But even, were it conceived to apply to only thoroughbred breeding and racing, it would warrant review by this Court, inasmuch as professional sports have become a substantial part of American life. The antitrust section of the American Bar Association maintains a subsection on antitrust in sports, and treatises are written on the subject.[8] Exclusionary activities which stabilize prices and thwart consumer preferences have consistently been renounced by this Court. It should do so once again.

We respectfully submit that a writ of certiorari should issue.

DATED: San Francisco, California, March 16, 1989

Respectfully submitted,

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[8] e.g., Weistart and Lowell, *The Law of Sports* (Bobbs Merrill, 1979) which contains 300 pages of discussion of "antitrust aspects of sports".

Appendix A

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 88-5130

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ROBERT D. STRATMORE,
Plaintiff-Appellant,

v.

MICHAEL H. GOODBODY, SHAREEF DANCER (USA) SYNDICATE, DALHAM HALL STUD, and ROBERT ACTON,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Eastern District of Kentucky.

Decided and Filed January 23, 1989

Before: KENNEDY, GUY and RYAN, Circuit Judges.

KENNEDY, Circuit Judge. Plaintiff-appellant Robert D. Stratmore appeals the grant of summary judgment to defendants-appellees, the Shareef Dancer horsebreeding syndicate and its officers, in this antitrust action. The District Court rejected plaintiff's claim that the "no auction" clause in defendants' Syndicate Agreement violated Section 1 of the Sherman Act, 15 U.S.C. § 1, as well as two pendent state law claims alleging tortious interference with contractual relations and interference with prospective advantage. We find that summary judgment was properly granted; there was no

genuine issue of material fact and defendants were entitled to judgment as a matter of law. Defendants did not engage in any *per se* illegal activity, there was no appreciable suppression of competition under a rule of reason analysis, and the requisite elements of the Kentucky law tort claims were not met. We affirm.

I

Shareef Dancer, a thoroughbred stallion, was the object of a syndication agreement. The Syndicate is an unincorporated association formed under English law, and is composed of forty "shares" (initially valued at $1,000,000 each) of undivided ownership interests. Each share entitles a member of the Syndicate to breed a mare with Shareef Dancer every season over the stallion's life. The Syndicate Agreement allows members to sell either shares or breeding rights for a single season (also known as a "nomination"), subject to ¶ 13(d), which provides, "At no time shall any share or nomination be sold at auction."

This case arises from plaintiff's attempt to auction a Shareef Dancer nomination for the 1986 season. In February 1985, Stratmore purchased the nomination for $102,000 on the weekly Matchmaker Breeders' Exchange, a private organization. He intended to resell it at Matchmaker's November 1985 auction, and signed a contract setting a reserve price of $125,000. Stratmore notified the Syndicate of his plans to auction the nomination, and was informed that this violated the Syndicate Agreement. Goodbody, chairperson of the Syndicate's oversight committee, also notified Matchmaker of the violation of the "no auction" clause after Stratmore refused to withdraw the nomination. Matchmaker itself withdrew the nomination from auction; it had a policy to abide by the terms of syndicate agreements, and its rules also required members to purchase only for breeding purposes and not for resale. This left plaintiff with the alternatives of selling the nomination through listing it on Matchmaker's

weekly bid-and-asked exchange, through a bloodstock agent, through advertisements in newspapers and trade journals, and other private contacts. Beginning in November 1985, he listed the nomination on Matchmaker's weekly exchange for several weeks. He initially asked for $125,000, but received no offers despite reducing the listing price, and finally sold the nomination privately for $90,000 in February 1986.

Plaintiff's complaint, filed on November 8, 1985, alleged a violation of section 1 of the Sherman Act, 15 U.S.C. § 1, as "a contract, combination, and conspiracy to fix and stabilize prices for shares and nominations of thoroughbred stallions." He also alleged tortious interference with contractual relations and interference with prospective advantage under Kentucky common law. After extensive discovery, both parties filed motions for summary judgment pursuant to Rule 56, Fed. R. Civ. P. The District Court denied plaintiff's motion for partial summary judgment, and granted defendants' motion for summary judgment on all claims. We agree with the District Court that this is not a price fixing or price stabilization case, which would be illegal *per se*, and that the "no auction" clause did not have an unlawful purpose or anticompetitive effect under a rule of reason analysis. We also agree that plaintiff has failed to establish the elements of his state law tort claims.

II

Summary judgment is granted only when "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Rule 56(c), Fed. R. Civ. P. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). As the District Court explains at length, the Supreme Court and this Court have tempered a "reluctance" to grant summary judgment in antitrust litigation, *Potters Medical Center v. City Hospital Ass'n*, 800 F.2d 568, 572 (6th Cir. 1986), with the recognition that "[s]ummary judgment procedure is properly regarded not as a disfavored procedural

shortcut, but rather as an integral part of the Federal Rules. . . ." *Celotex Corp.*, 477 U.S. at 327. *See also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The evidence must be viewed in a light most favorable to the nonmoving party, giving that party the benefit of all reasonable inferences. *Matsushita Electric*, 475 U.S. at 587; *Potters Medical Center*, 800 F.2d at 572. The District Court correctly applied summary judgment procedure in deciding this case.

III

Section 1 of the Sherman Act proscribes every contract, combination, or conspiracy in restraint of trade or commerce. 15 U.S.C. § 1. As we stated in *Continental Cablevision of Ohio, Inc. v. American Electric Power Co.*, 715 F.2d 1115 (6th Cir. 1983), a plaintiff must prove two essential elements to establish a section 1 violation: (1) that defendants entered into a contract, combination, or conspiracy; and (2) that such contract combination or conspiracy amounted to an unreasonable restraint of trade. *Id.* at 1118. "In essence, plaintiffs must demonstrate that the alleged . . . conspiracy had either an unlawful purpose or an anticompetitive effect." *Id.*, citing *United States v. United States Gypsum Co.*, 438 U.S. 422, 436 n.13 (1978).

A

The threshold requirement under *Continental Cablevision* is proof of concerted action; unilateral conduct is not sufficient. *See Potters Medical Center*, 800 F.2d at 573. As with the District Court, we need not decide whether the Shareef Dancer Syndicate, which is an unincorporated association formed under English law providing forty undivided interests in a single horse, represents concerted or unilateral conduct. While the law is clear that a *corporation* and its officers do not engage in concerted action within the meaning of section 1, *see Copperweld Corp. v. Independence Tube Corp.*, 467 U.S.

752, 769 (1984); *Potters Medical Center*, 800 F.2d at 573, the status of an unincorporated association is murkier. *See* E.W. Kintner, Federal Antitrust Law § 9.14 (1980) ("Though partnerships have been treated as a single 'person' within the meaning of Section 1, it is clear that the partnership form alone will not save the participating partners from what would otherwise be an unlawful conspiracy in restraint of trade."). The record does not show a genuine issue of material fact on either unlawful purpose or anticompetitive effect under the second prong of the *Continental Cablevision* test regarding defendants' "no auction" clause. For this reason, we leave the nature of a horsebreeding syndicate's ability to conspire in violation of section 1, for another day.

B

Beyond the threshold, a plaintiff must prove that the alleged combination or conspiracy had an unlawful purpose or an anticompetitive effect. *Continental Cablevision*, 715 F.2d at 1118. Plaintiff argues that we should employ a *per se* analysis because defendants conspired "to fix and stabilize prices for Shareef Dancer shares and nominations." To hold that defendants' "no auction" clause constitutes price fixing or stabilization, and is thus a *per se* violation of section 1, would stretch the doctrine far beyond its outer limits. We reach this conclusion for three reasons. First, plaintiff has failed to show that proscribing sales at Matchmaker's auction allows the Syndicate to fix or stabilize prices. Second, Matchmaker's "public auction" is actually private. A number of equally accessible sales channels for a nomination exist, including Matchmaker's weekly bid-and-asked listing, which reaches more members than its "public" auction. Third, plaintiff has failed to demonstrate an injury even under a *per se* analysis. We consider below each of these reasons.

Plaintiff has not shown that the Syndicate's "no auction" clause allows it to fix or stabilize prices. The District Court notes that "the record [does not] reflect any attempt by the

syndicate or its agents to control the manner in which—except in regard to an auction—the price at which a season was sold." There is no evidence that the syndicate ever disapproved the prices arrived at in individual, private transactions. This case simply does not fit the paradigmatic example of price stabilization in which firms exchange price information in order to stabilize the price, thereby interfering with price setting by free market forces. *See United States v. Container Corp. of America*, 393 U.S. 333 (1969). In fact, it is just as likely that an *auction* would serve to stabilize prices. In a series of individually negotiated transactions, buyers and sellers will set differing prices for each nomination. In contrast, an auction with a number of Matchmaker's private members present may result in a consensus value for a particular stallion's nomination.

Plaintiff's efforts to characterize this as a price *stabilization* case appear to be an attempt to escape the rule that there is no antitrust injury if a conspiracy actually tends to *benefit* a plaintiff. The Supreme Court has stated:

> To survive petitioners' motion for summary judgment, respondent must establish that there is a genuine issue of material fact as to whether petitioners entered into an illegal conspiracy that caused respondents to suffer a cognizable injury. This showing has two components. First, respondents must show more than a conspiracy in violation of the antitrust laws; *they must show an injury to them resulting from the illegal conduct.* . . . Except for the alleged conspiracy to monopolize the American market through predatory pricing, these alleged conspiracies could not have caused respondents to suffer an "antitrust injury," because they *actually tended to benefit respondents.*

Matsushita Electric, 475 U.S. at 585-86 (citations omitted; emphasis added). Plaintiff has pointed to no evidence on why

the Syndicate would want to keep prices unnaturally low, or stabilized, and unnaturally *high* prices which might result from lack of public markets (which in any event do not exist for nominations) do not cause antitrust injury to sellers.

A second consideration militating against *per se* analysis is the fact that Matchmaker's auction is *private*. The auction is limited to Matchmaker's members; it is not "a free, open, competitive sales arena." Also, the auction rules allow for manipulation of the market. An owner can surreptitiously bid on his own horse, and preferred customers can "bump" average customers. Plaintiff has not shown that there is a genuine issue of material fact over whether Matchmaker's auction is "the most price sensitive market available." There are alternative sales channels which are equally open and accessible.

One of the major alternatives to an auction is Matchmaker's weekly exchange, which lists horses on a bid-and-asked basis. The exchange is open to the same members as the auction, and the results of those sales are made public. *Id.* We find unpersuasive plaintiff's argument that " 'Being there and seeing something once in person is more valuable than reading about it 100 times.' " Market forces of supply and demand operate in the exchange listing to the same extent as the auction, given that both are open to the same membership. Also, plaintiff had several selling channels in addition to the listings in Matchmaker's weekly exchange. These alternatives included sales through a bloodstock agent, through advertisements in newspapers and trade journals, and other private contacts. Such contacts are no more "private" than Matchmaker's members-only auction.

Lastly, plaintiff has not shown damages. His inability to find a buyer through any sales channels until he reduced the nomination to $90,000 indicates that he did not suffer an injury even under a *per se* analysis. After plaintiff failed to sell his nomination privately before the auction for $150,000,

he listed it on Matchmaker's weekly exchange for $125,000 in November 1985. He was unable to find a buyer at that price, and reduced his asking price several times but was still unsuccessful. Stratmore eventually sold the nomination privately for $90,000 in February 1986. The only two instances in which a Shareef Dancer 1986 nomination was sold for more than $100,000 involved special circumstances. One sale was agreed to in 1983 as an inducement to sell a share, and the other involved a swapping arrangement in which the selling party agreed to purchase a future nomination at the same price. Under these circumstances, the District Court was justified in granting summary judgment on plaintiff's inability to show injury even under a *per se* analysis. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). This is not, however, a *per se* case.

C

In order to prevail in the absence of *per se* liability, plaintiff has the burden of showing an unreasonable restraint of trade. *See Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 29 (1984). As we noted above, *Continental Cablevision* and the Supreme Court cases require an examination of unlawful purpose or anticompetitive effect. The record discloses no genuine issue as to either. As to purpose, the "no auction" clause serves the important purpose of insuring that the Syndicate has control over the quality of mares which breed with Shareef Dancer. The Syndicate members have collectively invested $40 million in a single asset, the stallion itself, and the value of their investment depends on producing a quality foal. Likewise, the "no auction" clause does not have an unreasonable anticompetitive effect in light of the surrounding circumstances. *See Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 343 (1982); *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 690-91 (1978).

The starting point in a rule of reason case is to identify the relevant product and geographic markets. *See* W.C. Holmes, 1988 Antitrust Law Handbook, § 1.04[2], at 148-50. The relevant market is used to gauge market power, which in turn indicates the potential anticompetitive effect of a challenged restraint. This contrasts starkly with *per se* analyis, under which a determination of the relevant market is not significant. *See Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 5 (1958) (The "principle of *per se* unreasonableness . . . avoids the necessity for an incredibly complicated and prolonged economic investigation . . . ."). In this case, the relevant product market does not require a complex investigation and is dispositive.

The Supreme Court has explained "that the inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition." 435 U.S. at 691. The District Court found "no appreciable suppression of competition," even when narrowly defining the relevant product market as nominations of Shareef Dancer. Broadening the relevant product market to thoroughbred stallion nominations, the court found the anticompetitive effect to be "negligible." We agree. Regardless of how the market is defined, the "no auction" clause cannot conceivably have the requisite anticompetitive effect given that it is limited to one thoroughbred stallion. We need not address the relevant geographic market, given the clear nature of the product market. Because plaintiff was unable to show a genuine issue of material fact on suffering injury, defendant has not violated section 1 under *either* a *per se* or a rule of reason approach. Plaintiff likewise failed to meet his burden on the state law tort claims.

IV

The District Court also granted summary judgment in favor of defendants on plaintiff's Kentucky law tort claims of interference with contractual relations and interference

with prospective advantage. Both claims fail given our finding that there was no antitrust violation. In particular, plaintiff has failed to show a genuine issue of material fact on the issue of damages, which is an essential element in any tort claim.

A

Under Kentucky common law, intentional interference with contractual relations gives rise to a tort action if it is malicious or without justification. *Davis H. Elliot Co. v. Caribbean Utilities Co.*, 513 F.2d 1176, 1182 (6th Cir. 1975). The Court of Appeals of Kentucky has more recently expanded on this, stating that "no action lies in Kentucky for such a breach unless the inter-meddler employs unlawful means, such as fraud, deceit, or coercion." *Henkin, Inc. v. Berea Bank & Trust Co.*, 566 S.W.2d 420, 425 (Ky. App. 1978). Naturally, the basic tort elements of duty, breach, causation, and damages must all be proven. *See* Prosser & Keeton, Law of Torts, § 30, at 164 (5th ed. 1984); *Henderson v. Milobsky*, 595 F.2d 654, 658 n.22 (D.C. Cir. 1978) (citing Prosser).

Plaintiff alleges that defendants "knowingly and without privilege or justification interfered with and caused Matchmaker to breach [its] contract" with plaintiff. The claim is based on a telex from Goodbody, the Syndicate chairperson, to Matchmaker: "I am sure that we will have the full cooperation of Matchmaker in the event of Mr. Stratmore deciding to go ahead and offer this season for sale." While it is clear that Matchmaker withdrew plaintiff's nomination from auction, it is *not* clear either that Matchmaker breached its contract, or that the withdrawal resulted from "unlawful means" by the Syndicate.

To tortiously interfere requires "the existence of a contract between the plaintiff and a third party and a subsequent breach of the contract by the third party." *Industrial Equip-*

ment Co. v. Emerson Elec. Co., 554 F.2d 276, 289 (6th Cir. 1977). The District Court found that Matchmaker did not breach its contract because its contract with plaintiff gave it " 'the right to refuse a consignment of any share or season . . . for any reason which in its sole discretion it deems appropriate.' " In this case, there is convincing evidence that Matchmaker withdrew the nomination not because the telex was coercive, but because the telex made it aware of plaintiff's breach of the Syndicate Agreement. The head of Matchmaker, Mr. Weisbord, testified that it was company policy to respect the terms of syndicate agreements. The policy is based on their desire to avoid litigation. Given our earlier conclusion that the "no auction" clause is a lawful means of ensuring quality mares are presented to Shareef Dancer, defendants' interference was not "without justification" or "coercive." As the District Court found, there was neither breach nor causation.

Lastly, we agree with the District Court that plaintiff has failed to present a genuine issue of material fact on the issue of damages. As we discussed in conjunction with the antitrust claim, plaintiff did not present any meaningful evidence that he could have obtained more than $100,000 but for the "no auction" clause.

B

Plaintiff has likewise failed to establish the elements necessary to prevail on a claim of tortious interference with prospective advantage. The Court of Appeals of Kentucky considers the key factor to be "improper interference" with the relations. *Cullen v. South East Coal Co.*, 685 S.W.2d 187, 190 (Ky. App. 1983), cited by the District Court. As we stated above, defendants did not *improperly* interfere, given their valid interest in controlling the quality of mares presented to Shareef Dancer. Also, plaintiff's failure to establish damages is equally dispositive as to prospective advantage.

For the above reasons, the District Court's grant of summary judgment in favor of defendants is **AFFIRMED.**

Appendix B

United States District Court
Eastern District of Kentucky
Lexington

Eastern District of Kentucky

Filed Dec. 30, 1987
at Lexington
Leslie G. Whitmer
Clerk, U.S. District Court

Civil Action No. 85-454
Robert D. Stratmore
Plaintiff,

v.

Michael H. Goodbody, et al.
Defendant.

Memorandum Opinion and Order

This is an antitrust action brought pursuant to 15 U.S.C. § 1 and 15 U.S.C. § 15. Jurisdiction is conferred by 28 U.S.C. § 1337. The action also involves pendent claims brought under state law but arising out of a common nucleus of operative facts. The action is currently before the Court on the plaintiff's motion for partial summary judgment and the defendants' motion for summary judgment.

This cause of action centers around the Syndicate Agreement for the thoroughbred stallion Shareef Dancer.[1] On February 20, 1985, the plaintiff, Robert D. Stratmore, purchased a 1986 nomination, or right to breed a mare for one season, for Shareef Dancer. The nomination was purchased on the weekly breeding exchange of Matchmaker Breeders' Exchange, Ltd. for

[1] Shareef Dancer was the Irish Sweeps Derby winner in 1983. Among the members of the Shareef Dancer Syndicate are Her Majesty Queen Elizabeth II, Sheikh Maktoum Bin Rashid Al Maktoum, Warner L. Jones, Jr., W.S. Farish III, Bertram Firestone, and Bereton C. Jones, the Lieutenant Governor of Kentucky.

$102,000.00. The plaintiff bought the nomination with the intention of reselling it in the November 10, 1985, auction, also conducted by Matchmakers, and signed a contract with them to that effect. The nomination was to be offered at the auction with a reserve price of $125,000.00.

The defendants informed the plaintiff that the Shareef Dancer Syndicate Agreement, of which the plaintiff had no prior specific knowledge, contained a provision forbidding the sale of a share or season at *auction*. The plaintiff was asked, but refused, to withdraw the nomination from the auction. The defendants also informed Matchmaker that sale by auction was contrary to the terms of the Syndicate Agreement and subsequently the nomination was withdrawn by Matchmaker itself. In February, 1986, Stratmore sold the season privately for $90,000.00.

Section 1 of 15 U.S.C. states in part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

Section 15 declares in part:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue. . . .

Specifically the plaintiff charges in his Third Amended Complaint that:

> 23. The conduct of defendants, and each of them, . . . constitutes a contract, combination, and conspiracy to fix and stabilize prices for Shareef Dancer shares and nominations, in *per se* violation of Section I of the Sherman Antitrust Act, to boycott and refuse to deal with auction sales in violation of Section I of the Sherman Antitrust Act, and to otherwise restrain trade and commerce unreasonably . . . .

Essentially the complained of contract and/or combination is that the defendants included restrictive provisions to fix and stabilize prices for shares and seasons in the Syndicate Agree-

ment and subsequently enforced these provisions. The provisions which are alleged to prevent the sale of shares and seasons in a free and open market in which supply and demand would determine price are contained in Paragraph 13 of the agreement:

> 13. For the benefit and protection of shareholders the value of each share and the nominations IT IS HEREBY AGREED AND DECLARED that:
>
> (a) Nominations for the first four seasons that is until after the 15th day of July, 1987 (hereinafter in this clause referred to as "the said date") may be sold privately or through the syndicate secretaries but in either event at a fee which must be approved by the Committee whose decision on this matter shall be final and binding and open to no appeal review or question.
>
> (b) With the single exception of His Highness Sheikh Maktoum Al Maktoum who at the date hereof is the owner of ten shares any shareholder wishing to sell or dispose of his share or shares before the said date may do so only by offering it to all or any one of the remaining shareholders . . . and at a price fixed by the Committee whose decision on this matter shall be final and binding and open to no appeal review or question. . . .
>
> (c) Any shareholder wishing to sell a share or a nomination after the said date may do so privately subject to the written consent first had and obtained of the Committee and the Committee hereby reserves the right to fix a price below which the same may not be sold.
>
> (d) *At no time shall any share or nomination be sold at auction.* (Emphasis added.)

Initially, the plaintiff charged that several other thoroughbred syndicates and individuals were involved in a conspiracy in regard to plaintiff's inability to sell his nomination at the Matchmaker's auction, but these parties were dismissed by the Court's Memorandum Opinion and Order of July 16, 1986. The present defendants in the action are the syndicate itself, a member of its management committee, Dalham Hall Stud which is the secre-

tary to the syndicate, and the managing agent for Dalham Hall who has conducted the affairs of the syndicate.

The plaintiff requests that Paragraph 13 in its entirety be ruled in *per se* violation of the Section I. The Court notes that nothing in the record substantiates that the plaintiff has a claim under subparagraphs (a), (b), or (c). Stratmore is not a shareholder of Shareef Dancer nor is there any indication that he attempted to become one and was blocked by Paragraph 13.

Nor does the record reflect any attempt by the syndicate or its agents to control the manner in which—except in regard to an auction—or the price at which a season was sold. Myron Rosenthal, a Shareef Dancer shareholder, stated in his deposition in regard to how the price was set for a nomination, "The market sets it nobody sets it unless you have some customers that you are going to sell it to that you know." (Rosenthal depo. at 50.) Bereton Jones, also a shareholder, testified at his deposition that the two years in which he sold his nomination—once privately and once on the Matchmaker Exchange—he discussed the fee with the syndicate manager. He then acted on his own behalf without any sort of syndicate approval or sanction. (B. Jones depo. at 28-30; *see also* Goodbody depo. at 104-05.) Robert Clay, a member of the Syndicate Committee, also averred, "I know of no occasion where the price at which anybody's been able to sell a season or share has ever been—that the price has been affected by anybody or group." (Clay depo. at 103, *see also* 118.) Indeed the plaintiff himself argues: "Thus, what the record unequivocally discloses with respect to the pricing and closing of sales of shares and seasons is that the Shareef Dancer Syndicate represents a group of individual sellers engaging in individual transactions . . . ." (Memorandum of Points and Authorities in Opposition to Defendants' Motion for Summary Judgment at 28.)

The remaining challenge in regard to the antitrust claim is whether the Court should grant summary judgment as to 13(d), of the Shareef Dancer Syndicate Agreement, the no auction provision, which was enforced according to the allegations in the complaint. This, in turn, entails a discussion of the standard to be used in determing whether to grant summary judgment in an action such as this. In three recent decisions the Supreme Court

has indicated a reevaluation of the previous position urging fear and dread of summary judgments.

Rule 56, Fed. R. Civ. P., states that summary judgment shall be granted if the record shows "that there is no genuine issue as to any material fact . . . ." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 54 U.S.L.W. 4319, 4322 (U.S. March 25, 1986), emphasizes the weight to be given "genuine," holding, "When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Celotex Corp. v. Catrett*, 54 U.S.L.W. 4775, 4777 (U.S. June 24, 1986), elaborated still further on the showing necessary to withstand a motion declaring that "the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Finally *Anderson v. Liberty Lobby, Inc.*, 54 U.S.L.W. 4755, 4758 (U.S. June 24, 1986), elaborated still further indicating that the standard to be used in granting summary judgment is essentially the same as used in regard to a motion for directed verdict. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Id.*

The plaintiff argues that the Sixth Circuit, after considering these decisions, still called for "reluctance" in disposing of complex antitrust actions via summary judgment. *Potters Medical Center v. City Hosp. Assn*, 800 F.2d 568, 572 (6th Cir. 1986). Yet, it must be noted that the Court of Appeals affirmed summary judgment on all of the 15 U.S.C. § 1 claims in that action, denying summary judgment in regard to § 2 claims because the relevant market had not been determined and there was no determination as to the existence of a monopoly. *Id.* at 573-74. This action is not exceedingly complex, it does not involve proof of a conspiracy, and motive and intent play minor roles. *See id.* This Court finds that under the factual circumstances of this action the Supreme Court's advice in *Catrett* is most applicable:

"Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.' " 54 U.S.L.W. at 4778.

Before launching into the specifics of what the record discloses in this action, it should be stated that adequate time was provided for discovery and adequate discovery was undertaken by both parties. This action was filed on November 8, 1985. There have been oral arguments in regard to the plaintiff's request for a Temporary Restraining Order; the complaint has been amended three times; at least thirty depositions have been noticed, mostly by the plaintiff; and ten volumes of documents have been compiled as the record. The only discovery request denied by the Court was plaintiff's request to depose Sheikh Maktoum Bin Rashid Al Maktoum in Dubai. There are no outstanding discovery requests.

Initially, the Court must state that it cannot rule that subsection (d) of Paragraph 13 is *per se* a violation of the Sherman Antitrust Act, 15 U.S.C. § 1. As the Supreme Court explained in *N.C.A.A. v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 104 (1984):

> *Per se* rules are invoked when surrounding circumstances make the likehihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct.

It simply is not apparent on its face that this contract provision works to "fix and stabilize" prices. As indicated by the plaintiff the effect of the "no auction" clause becomes clear only "against the backdrop of the present market for shares and seasons in thoroughbred stallions." (Memorandum of Points and Authorities in Support of Motion for Partial Summary Judgment at 14.)

In ruling that the plaintiff has not mustered enough factual evidence to withstand the defendants' motion for summary judgment in regard to Sec. 1 of the Sherman Act, the Court finds that the plaintiff has not suffered an injury such as federal antitrust legislation is designed to remedy. *Matsushita Electric*, 54

U.S.L.W. at 4322. First, the plaintiff makes a poor showing that the no auction provision actually caused him to suffer a loss in regard to the 1986 nomination he purchased. Second, the plaintiff fails to demonstrate that the no auction clause affects the free play of the market in Shareef Dancer seasons.

Stratmore purchased his nomination for $102,000.00 with the intention of selling it presumably for a profit.[2] If the purpose of the no auction clause is to keep the price of Shareef Dancer shares unnaturally high then the plaintiff is not injured by such a clause. *Id.*, at 4321. He should be able to ride the crest of the inflationary wave to a profit. If the purpose of the no auction clause is to keep prices unnaturally low, then the Shareef Dancer syndicate members are economic fools, or devious schemers, with an ulterior motive and the plaintiff "must come forward with more persuasive evidence to support their claim than would otherwise be necessary." *Id.*, at 4322.

Furthermore Stratmore has failed to present evidence that his nomination was competitively priced so that it would have sold had it been offered at auction. Stratmore listed the nomination for the November 10, 1985, auction with a reserve price of $125,000.00. All consignments at the Matchmaker auction are offered without a live foal guarantee. It is not necessary that

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[2] Robert D. Stratmore, a California investor, is not a novice in the thoroughbred industry. In a letter dated March 14, 1986, he reminded Barry Weisbord, the President of Matchmaker, that "if you look at my history of selling with you in the last two years, you will find that I have bought or sold an average of $2,000,000 or more per year." Stratmore bought the season warranting that he "read and understand[s] . . . the Syndicate Agreement for the stallion and understand[s] that he or she is subject to its lawful terms," and that he was purchasing "for breeding purposes, and is not purchasing with a view toward resale of the share or season." (Matchmaker Rules and Regulations, § 403.00(2),(5).) Stratmore was also aware of no auction clauses in syndicate agreements in that he had consigned a Seattle Slew season to the November, 1984, Matchmaker auction subject to withdrawal if a no auction provision were voted in by shareholders. (Memorandum of Points and Authorities in Support of Defendants' Motion for Summary Judgment, Appendix II, Ex. 23.)

Stratmore produce a buyer who would swear to being ready, willing, and able to buy the season at the auction, *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 567-68 (1981), but he must present evidence that a profitable sale was a possibility. *Matsushita Electric*, 54 U.S.L.W. at 4322. Before the auction Stratmore attempted to sell his nomination privately for $150,000.00, no live foal guarantee, but was not successful. (Lane depo. at 61-62, 69-71.) Two weeks after the auction the plaintiff listed the season on the Matchmaker's Exchange for $125,000.00 but found no buyer at that price. The listing continued unsuccessfully for several weeks.

The defendants offer the explanation that the nomination was over-priced, especially in that it was offered with no guarantee. (*See* Acton, depo. at 71-77, 101-03; B. Jones depo. at 49.) The two instances in which a nomination was sold for more than $100,000.00, no guarantee, involved special circumstances and were set up before the 1986 season. (*See* Acton, depo. at 101-03.) The plaintiff must present some evidence more than "mere conjecture" that he would have been able to sell his nomination at auction for at least $125,000.00, no guarantee. *Quarles v. General Motors Corp.*, 758 F.2d 839, 840 (2d Cir. 1985).

Even if the plaintiff had established that the enforcement of the no auction provision injured him, he has not shown that the general purpose and effect of the clause is to stabilize or fix the price of Shareef Dancer seasons. The Supreme Court stated in *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 493 (1939):

> The end sought [in the enactment of the Sherman Act] was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury.

This does not mean that all combinations or restraints are illegal. As the Court elaborated further in regard to the "rule of reason,"

> the words "restraint of trade" at common law and in the law of this country at the time of the adoption of the Anti-trust

> Act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition or unduly obstructing the due course of trade which, either because of their inherent nature or effect or because of the evident purpose of the acts, etc. injuriously restrained trade. . . .

Id. at 500. A restraint on competition is not frowned upon by the act "unless the restraint is shown to have or is intended to have an effect upon prices in the market or otherwise to deprive purchasers or consumers of the advantages which they derive from free competition." *Id.* at 501. The evidence in the record indicates that the Matchmaker auction is just one of many ways in which a thoroughbred stallion nomination can be sold and thus a no auction clause does not deprive a purchaser "of the advantages which they derive from free competition." *See Fran Welch Real Estate Sales, Inc. v. Seabrook Island Co.*, 809 F.2d 1030, 1032 (4th Cir. 1987).

In fact, the auction as a means of selling seasons is a recent development in the thoroughbred industry. In the spring of 1983, the International Share and Season Information Exchange appeared on the scene to disseminate information in regard to the price of shares and seasons. In November, 1983, Matchmaker conducted the first auction of thoroughbred seasons. Auctions have subsequently been conducted each January, July, and November.[3] In the summer of 1984 Matchmaker Breeders Exchange was begun. In the fall of 1985 Stallion Access, operated by Fasig-Tipton and Bloodstock Research Inc., arrived to challenge Matchmaker's dominance. It conducts a daily exchange as well as semiannual auctions. Finally on November 9, 1986, the Keeneland Association expanded its bloodstock auctions to include separate auctions of shares and seasons. (Heckerman, "A Niche in the Marketplace," *The Thoroughbred Record.* Nov. 1986, at

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[3] Matchmaker auctions are held on Sunday evenings at the conclusion of the three major sales weeks. The site is the Radisson Plaza Hotel in downtown Lexington. Complimentary food and strong drink are provided. They are social events as well as business affairs.

4630.) It is this new arena of auctions and exchanges that the plaintiff refers to as the "public market."

It must be pointed out, however, that it is a two-fold expansion including both exchanges and auctions. Although the Shareef Dancer agreement prohibits the sale of shares or seasons through an auction, it is mute in regard to the use of an exchange. This public channel is thus still open to all those who wish to tune in. The Matchmaker exchange is "operated on a weekly bid-and- ask basis," *Id.* at 4631, and offers the advantage of being open throughout the year. *Id.* at 4633. The results of sales on the Matchmaker exchange are as public as those made by auction. *Id.* at 4634. Stratmore bought his nomination through the Matchmaker exchange and also attempted to sell it through the same medium. The discussions in regard to the public market for seasons tend to lump auctions and exchanges together in discussing their virtues and drawbacks. (*See* Weisbord depo. at 35-36; Lane depo. ex. 1; Peters depo. at 18-21, Capps, "Antitrust Actions and the Horse Business," *The Thoroughbred Record*, Dec. 1985, at 5963.)

The evidence in regard to the benefits peculiar to an auction is mixed. Barry Weisbord, the founder of Matchmaker, when asked about "whether or not a restriction preventing the sale of a season or share at auction would artificially impact the value or the price of a season or share of such a horse in a syndicate," responded: "Assuredly, having seasons or shares subject to the marketplace, could give a truer indication of price than not to have the seasons subject to the marketplace." (Weisbord depo. at 50-51.) This, in general, is the position of the plaintiff—that an auction provides the freest atmosphere for the forces of supply and demand and thus the best indication of true value. On the other hand, Leone Peters, who has owned over 250 horses individually as well as being part owner of the 1982 Kentucky Derby winner, Gáto Del Sol, testified that "I think the auction is a much better place to sell [than on an exchange or privately] because people lose their marbles sometimes and bid a little more than they should be bidding." (Peters depo. at 59.) Peters thus indicates that auctions can result in artifically enhanced prices.

In fact, describing the Matchmaker auction as a "public market" is a misnomer. The first Matchmaker auction was open to the public, but the second auction in July, 1984, and succeeding auctions have been for members only. Although up to 1200 people participated in the first, open Matchmaker auction, as of June 30, 1986, Matchmaker had 690 trading members. To be eligible to join Matchmaker one must have a net worth of at least $200,000 and (a) owned and managed for at least two years at least five thoroughbred horses, or (b) owned or managed for at least two years a farm that breeds thoroughbreds and boards at least five thoroughbreds, or (c) purchased or sold at least five thoroughbred stallion shares or thoroughbred mares or ten thoroughbred seasons in each of the past two years. (Matchmaker, Rules and Regulations, § 203.00.) Another aspect of the auction affecting its reliability as a barometer of true value is that an owner can surreptitiously bid on his own share or season. Additionally only one share or season per stallion may be offered at an auction. Average customers can have their listing for a stallion "bumped" for an offering by a preferred customer. (Stratmore depo. Ex. 27.) It is for these reasons that a member of the Shareef Dancer syndicate committee referred to the auction as an "isolated limited supply market." (Clay depo. at 174- 75.) It is hardly a free, open, competitive sales arena.

In addition, the traditional shares and seasons market which the plaintiff referes to as the "private market" is available to sellers of Shareef Dancer nominations. These include dealing through the farm where the stallion stands, contacting a bloodstock agent, placing an advertisement in a newpaper or trade journal, calling shareholders directly, or contacting others in the thoroughbred industry. Although these methods are individualized and unorganized, they are still very much available to all of those who have Shareef Dancer nominations for sale. According to horseman John Gaines in a magazine interview, "even in the private market, the answer about a stallion's current value is as near to a consumer as the telephone, and . . . . sophisticated breeders always understood the nature of changing values." (Heckerman at 4633.) The Shareef Dancer shareholders apparently marketed their seasons independently of any central control and with only a "gentlemanly" concern for the syndicate man-

ager's opinion. (*See* B. Jones depo. at 29.) The multiplicity of sellers and of outlets for sales would seem to belie any stabilizing or price fixing effect of a no auction clause.

The Sherman Antitrust Act does not guarantee the freest possible market nor does it guarantee "true" market values. It only ensures unrestrained competition. *Apex Hosiery*, 310 U.S. at 500-01. The seminal case applying the Rule of Reason, *Mitchel v. Reynolds*, 24 Eng. Rep. 347 (1711), sanctioned the enforceability of reasonable covenants not to compete. *Nat'l Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 689 (1977). As Justice Brandeis observed in *Board of Trade v. United States*, 246 U.S. 231, 238 (1917), "[T]he legality of an agreement or regulation cannot be determined by so simple a test as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence." Chief Justice White, writing in *Standard Oil v. United States*, 221 U.S. 1, 65 (1910), succinctly stated the test as to whether the agreement or combination was "unreasonably restrictive of competitive conditions." Justice Stevens, in reviewing the history of the Rule of Reason in *Nat'l Soc'y of Professional Eng'rs*, 435 U.S. at 691, maintained that "the Court has adhered to the position that the inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition."

The no auction clause in the Shareef Dancer Syndicate Agreement is limited in scope. It only affects one aspect of thoroughbred stallion season sales. Even if the market area is narrowly defined as the market for nominations of Shareef Dancer, there seems to be no appreciable suppression of competition. No auction clauses are not uncommon in the thoroughbred industry. And Shareef Dancer is certainly not the only stallion in the world. If the market area is widened to include what is still a highly specialized market—thoroughbred stallion nominations—the effect is negligible. The Court must conclude therefore that the no auction clause in the Shareef Dancer Syndicate Agreement does not unduly restrain trade or fix prices.

The plaintiff also alleges two causes of action based on state common law. He alleges that the defendants interfered with his

contractual relation with Matchmaker by forcing the withdrawal of his nomination from the November, 1985, auction. And, the plaintiff alleges interference with a prospective advantage.

In regard to the claim of tortious interference with Stratmore's contract with Matchmaker, one must first look at that contract. The contract under "Conditions of Sale," item 10, gives Matchmaker the discretion to refuse to carry out an auction sale for any reason. (Weisbord depo. at 175.) It states:

> THE COMPANY HAS THE RIGHT TO REFUSE A CONSIGNMENT OF ANY SHARE OR SEASON . . . FOR ANY REASON WHICH IN ITS SOLE DISCRETION IT DEEMS APPROPRIATE

(Stratmore depo. Ex. 10.)

The plaintiff bases his claim of interference on a telex to Harry Herbert of Matchmaker from Michael Goodbody which read:

> I am sure that we will have the full cooperation of Matchmaker in the event of Mr. Stratmore deciding to go ahead and offer this season for sale.

Also the plaintiff relies on the testimony of John T.L. Jones, III, a co-founder of Matchmaker, in regard to the telex. When asked, "Did you perceive this [the telex] as an effort to coerce Matchmaker into not going ahead and selling the season of Shareef Dancer at the auction?" Jones replied, "Right, yeah." (J.T.L. Jones depo. at 92.) Mr. Jones also testified that he thought a refusal to withdraw Stratmore's consignment might jeapordize Matchmaker's attempt to attract the business of Dalham Hall Stud and Sheikh Mohammad. *Id.* at 95-97. But Jones could not aver that this was the reason that the decision was made to withdraw the nomination—"I don't know that for a fact. I couldn't say because I didn't make the decision." When asked who did make the decision he replied, "Barry [Weisbord]." *Id.* at 97.

Barry Weisbord testified that it was his decision not to offer the Shareef Dancer nomination. (Weisbord depo. at 102, 103.) He explained that he wished to avoid litigation if possible. *Id.* at 97, 102, 112. He also reiterated that it was company policy to respect

the terms of syndicate agreements. *Id.* at 97, 99, 101, 103. Reflecting the discretion granted in the Matchmaker contract, Weisbord also testified that, "I have a right to sell anything I want to sell at that auction." The plaintiff fails to demonstrate that there was a breach of contract much less that any breach was caused by the defendants. *See Industrial Equipment Co. v. Emerson Elec. Co.*, 554 F.2d 276, 289 (6th Cir. 1977).

Finally, and this point is also dispositive of the plaintiff's claim of tortious interference with a prospective advantage, Stratmore cannot prove that he suffered a loss as the result of the defendants' actions. As discussed above, the plaintiff presents no meaningful evidence that he could have sold his nomination at $125,000.00. Additionally he has failed to establish *wrongful* interference. As the Court of Appeals of Kentucky observed in *Cullen v. Southeast Coal Co.*, 685 S.W.2d 187, 190 (Ky. Ct. App. 1978), the key to a description of tortious interference with a prospective contractual relation is "improper interference." This means that the interference must be accomplished by "fraud, deceit, or coercion," *Henkin, Inc. v. Berea Bank & Trust Co.*, 566 S.W.2d 420, 435 (Ky. App. 1978), or by malice. *Cullen*, 685 S.W.2d at 190. Nothing in the record substantiates that the defendants acted with fraud, deceit, coercion, or malice.

The Court, being sufficiently advised, IT IS HEREIN ORDERED that:

(1) Plaintiff's Motion for Partial Summary Judgment is DENIED;

(2) Defendants' Motion for Summary Judgment is GRANTED.

This 30th day of December, 1987.

HENRY R. WILHOIT, JR.
Henry Wilhoit, Jr., Judge

Appendix C

Statutes and Rules Involved

Sherman Act, Act of July 2, 1890, c. 647, 26 Stat. 290, § 1, as amended, 15 U.S.C. § 1:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."

Federal Rules of Civil Procedure, Rule 56:

> (a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.
>
> (b) For Defending Party. A party against whom a claim, counterclaim or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.
>
> (c) Motion and Proceedings Thereof. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability along although there is a genuine issue as to the amount of damages.
>
> (d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole

case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall, if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be

taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Mar. 2, 1987, eff. Aug. 1, 1987.)